IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 3, 2007

STATE OF TENNESSEE v. GABRIELE GLATT

Appeal from the Circuit Court for Montgomery County
No. 40600201 Michael R. Jones, Judge

No. M2007-00405-CCA-R3-CD - Filed May 13, 2008

Appellant, Gabriele Glatt, was convicted in a bench trial in Montgomery County of theft of property over $10,000. At the sentencing hearing, Appellant was sentenced to four years, all but ninety days suspended, and she was ordered to pay restitution in total of $14,610. Appellant appeals arguing that: (1) the evidence was insufficient; (2) the trial court erred in denying judicial diversion; and (3) the trial court erred in ordering restitution without making the requisite findings according to Tennessee Code Annotated section 40-35-304(d). After a thorough review of the record, we reverse the trial court's order of restitution and remand for a hearing during which the trial court must make the requisite findings pursuant to Tennessee Code Annotated section 40-35-304(d). In all other respects, we affirm the judgment of the trial court. Therefore, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings in accordance with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part; Reversed in Part and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Roger E. Nell, District Public Defender and Rebecca F. Stevens, Assistant District Public Defender, for the appellant, Gabriele Glatt.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; John Carney, District Attorney General, and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On September 8, 2005, Ms. Cindy Browning, the victim, was preparing a bank bag in her office at Elite Motors. Ms. Browning is the co-owner of Elite Motors. In the bag, Ms. Browning had $5,000 and two rings as well as other personal items. Ms. Browning intended to take the money to the bank to deposit it and the rings to the jeweler. One of the rings in the bag belonged to Mr. Ernie Wallace, the general manager, who had asked Ms. Browning to take his ring to the jeweler to be sized. The bank bag was sitting on Ms. Browning's desk when she was called away suddenly to pick up her grandson from school. When she returned, the bag was gone.

Ms. Browning alerted her employees, and everyone began looking for the bag. Elite Motors is equipped with surveillance equipment. Ms. Browning was unable to retrieve the video right away, but two employees worked on the video overnight. The next morning they were able to watch the videotape. The videotape showed that Appellant, an employee of Elite Motors, entered Ms. Browning's office and took the bag.

When she was confronted, Appellant did not deny taking the bag. Ms. Browning told Appellant if Appellant returned the bag, Ms. Browning would not call the police. Appellant stated that she no longer had the bag but would take Ms. Browning to where she had left it. Appellant stated that she had gotten scared and thrown the bag in a dumpster. Ms. Browning, Appellant and another employee, Matthew Hensley, got into Ms. Browning's car and drove to the dumpster. When they arrived at the dumpster, Appellant got out of the car and looked in the dumpster. It was empty. The bank bag was never recovered.

The police came to investigate on September 9, 2005. The incident report stated that the stolen property constituted cash, a post office box key, a ring of business keys and house keys. A few days after the theft, Mr. Wallace asked Ms. Browning if she had taken the rings to the jeweler. At that time, Ms. Browning remembered that the rings were in the bank bag. The incident report was supplemented on September 15, 2005, to include the rings.

On February 7, 2006, the Montgomery County Grand Jury indicted Appellant on one count of theft of property over $10,000. Appellant waived her right to a trial by jury. At the conclusion of a bench trial held on November 22, 2006, Appellant was found guilty as charged. On January 19, 2007, the trial court held a sentencing hearing. Appellant was sentenced to four years as a Range I Standard Offender. The trial court suspended all but ninety days of the sentence and ordered Appellant to make restitution of $8,155 to Ms. Browning and $6,455 to Mr. Wallace. Appellant now appeals.

ANALYSIS

Sufficiency of the Evidence

Appellant's first argument is that the evidence was insufficient to support her conviction. Appellant does not contend that she did not take the bank bag, but rather that the proof was insufficient to prove that the contents of the bank bag were worth more than $10,000. The State argues that the evidence was sufficient.

When a defendant appeals from a bench trial, the trial court's findings of fact carry the same weight as a jury verditc. *See State v. Wilson*, 990 S.W.2d 726, 729 (Tenn. Crim. App. 1998). On appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

"A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103. "Theft of property . . . is: . . . (4) a Class C felony if the value of the property . . . is ten thousand dollars ($10,000) or more but less than sixty thousand dollars ($60,000) . . . ." T.C.A. § 39-14-105(4).

As stated above, there is no dispute that Appellant took the bank bag. We need only determine whether there is sufficient evidence to prove that the value of the contents of the bank bag exceeded $10,000. The evidence at trial concerning the value of the contents came from the testimony of Ms. Browning and Mr. Wallace. Ms. Browning testified that the bank bag contained five bundles of $1,000, each bundle secured by a paperclip, totaling $5,000. She also testified that her missing ring was worth $3,155. Mr. Wallace testified that he saw Ms. Browning place his ring in the bank bag and that the ring was worth $6,455.

Appellant, both at trial and on appeal, argued that it was unlikely that Ms. Browning would have had a $5,000 deposit when she had a $10,000 deposit one day before the theft and a more than $10,000 deposit four days after the theft. However, Ms. Browning testified that other cash deposits near that time ranged from $7,870.49 to $26,309.79. Ms. Browning stated that the bank bag contained both personal and company monies. She also stated that Elite Motors received cash payments from customers on a daily basis.

Appellant also argues that it is unlikely that Ms. Browning would forget that she placed the rings in the bank bag. Ms. Browning testified that she only remembered about the rings when Mr. Wallace asked if she had made it to the jeweler.

In this case, the issue of the sufficiency of the evidence becomes purely a matter of credibility of the witnesses at trial. Tennessee Rule of Evidence 701(b) permits a lay witness to testify as to the value of his or her own property. As stated above, any issue with regard to the credibility of witnesses is an issue resolved by the trier of fact. *Pruett*, 788 S.W.2d at 561. At the conclusion of the trial, the trial court stated, "[Ms. Browning's] testimony is totally credible and uncontradicted." Clearly, the trial court found the testimony of Ms. Browning credible. The fact that the trial court found Appellant guilty also leads to the conclusion that Mr. Wallace was also a credible witness. Appellant has not proven that the evidence was insufficient to prove that the contents of the bank bag totaled more than $10,000.

Therefore, this issue is without merit.

Diversion

Appellant also argues that the trial court erred in denying her judicial diversion pursuant to Tennessee Code Annotated section 40-35-313. The State argues that Appellant has waived this issue for purposes of appeal.

Under Tennessee Code Annotated section 40-35-313, judicial diversion is available to a qualified defendant when he consents to deferral of the proceedings, and the trial court does not enter a judgment of guilty but puts the defendant on a form of probation. T.C.A. § 40-35-313(a)(1)(A). However, unlike probation under Tennessee Code Annotated section 40-35-303, the Code does not require automatic consideration for judicial diversion. *Compare* T.C.A. § 40-35-303(b) *with* T.C.A. § 40-35-313(a). In *State v. Michael K. Miller*, No. W2003-01621-CCA-R3-CD, 2004 WL 1686605 (Tenn. Crim. App., at Jackson, July 27, 2004), this Court stated:

> Although section 40-35-313 does not *per se* prescribe a petition or application for judicial diversion, the defendant who wishes to raise the issue on appeal must plan his reckoning with Tennessee Rule of Appellate Procedure 36(a), which provides that "relief may not be granted in contravention of the province of the trier of fact" and

> that relief is not assured to an appellant "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."
>
> Therefore, we cannot countenance a request for judicial diversion raised for the first time on appeal; the trial court had no opportunity, in the absence of the defendant's indication of consent to judicial diversion, to evaluate the merits of a disposition *via* diversion. *See State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983) (a court considering a diversion request must consider, along with the circumstances of the offense, "the defendant's criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant").

2004 WL 1686605, at *4. When a defendant has not requested judicial diversion at the trial level but has requested it on appeal, this Court has held that such an issue is waived on appeal. *State v. Kelly Michael Pickett*, No. M2004-00732-CCA-R3-CD, 2005 WL 2438385, at *11 (Tenn. Crim. App., at Nashville, Oct. 3, 2005), *aff'd on other grounds, State v. Pickett*, 211 S.W.3d 696 (Tenn. 2007) (affirming the opinion of this Court but not addressing the issue of waiver of judicial diversion).

Appellant makes no citations to the record where such a request for judicial diversion was made of the trial court. Likewise, Appellant does not state in her brief that such a request was made. The State points out this fact in its brief. We have thoroughly reviewed the record and can find no such request.

Therefore, this issue is waived for purposes of appeal.

Restitution

Appellant's final issue is that the trial court erred in failing to make the proper findings pursuant to Tennessee Code Annotated section 40-35-304 to impose restitution as a condition of probation. The State initially argues that it can find nothing in the record to support Appellant's conclusion that the restitution ordered herein is a condition of probation. In the alternative, the State argues that the trial court made the proper findings pursuant to Tennessee Code Annotated section 40-35-304 to impose restitution as a condition of probation.

As an element of sentencing, this Court reviews an order of restitution de novo with a presumption of correctness. *State v. Johnson*, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997); *State v. Thomas Stephen Thrasher*, No. 03C01-9904-CC-00144, 2000 WL 156810, at *3 (Tenn. Crim. App., at Knoxville, Feb. 15, 2000), *perm. app. denied,* (Tenn. Jan. 8, 2001). *See also* T.C.A. § 40-35-401(d).

Tennessee Code Annotated section 40-35-304 sets out the procedures the trial court must follow in ordering restitution. The trial court "may direct a defendant to make restitution to the victim of the offense as a condition of probation." T.C.A. § 40-35-304(a). "Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss." T.C.A. § 40-35-304(b). The amount of restitution that the defendant may be directed to pay is limited to "the victim's pecuniary loss." *See* T.C.A. § 40-35-304(b). The phrase "pecuniary loss" includes:

> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
> (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

T.C.A. § 40-35-304(e). There is no designated formula or method for the computation of restitution, but the trial court is required to consider "the financial resources and future ability of the defendant to pay or perform." Tenn. Code Ann. § 40-35-304(d). "[T]he amount of restitution a defendant is ordered to pay must be based upon the victim's pecuniary loss and the financial condition and obligations of the defendant; and the amount ordered to be paid does not have to equal or mirror the victim's precise pecuniary loss." *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

As we stated above, the State argues that Appellant should not conclude that the restitution ordered by the trial court is a condition of her probation. However, in the Probation Order filed February 7, 2007, the following statement is made, "10. I will observe any special conditions imposed by the Court as listed below: . . . . restitution $8,155.00 & $6,455.00." Therefore, it appears that restitution is a condition of Appellant's probation.

The presentence report prepared by the presentence service officer does include information about the financial losses of the victim. However, there is no information concerning Appellant's financial situation. At the sentencing hearing, the trial court's findings with regard to Appellant's financial resources and future ability to pay restitution consisted of "[Appellant] is an intelligent person who had a good job. Her earning abilities, at least prior to her committing this felony, were excellent."

We conclude that these findings do not meet the requirements under Tennessee Code Annotated section 40-35-304(d). The trial court's findings concerned Appellant's previous employment with the victim's business. There were no findings with regard to her employment

prospects at the time of the hearing or any other financial resources she might have available to her. We have no choice but to remand this case for a new restitution hearing.

Therefore, we remand this case in order for the trial court to hold a hearing and make findings regarding Appellant's financial resources and future ability to pay restitution as required by Tennessee Code Annotated section 40-35-304(d).

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

_____
JERRY L. SMITH, JUDGE